IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MERRILL MEST et al.,	:	
Plaintiffs	:	
	:	
v.	:	**CIVIL ACTION**
	:	**NO. 01-4943**
CABOT CORPORATION et al.,	:	
Defendants	:	

MEMORANDUM OPINION AND ORDER

RUFE, J. **April 29, 2004**

This case comes before the Court on Defendants' Motion for Summary Judgment on statute of limitations grounds.[1] For the reasons set forth below, Defendants' Motion is granted.

I. FACTUAL BACKGROUND[2]

Plaintiffs Wayne and Suzanne Hallowell (the "Hallowells") own and operate two non-contiguous dairy farms, one at 1150 Congo Road, Gilbertsville, Montgomery County, Pennsylvania (the "Congo Road Farm"), and the other at 176 Washington Road, Bechtelsville, Berks County, Pennsylvania (the "Washington Road Farm") (collectively referred to as the "Hallowell Farms").[3] The Hallowells and their family have farmed their land for over thirty years, and the land has been in the Hallowell family since approximately 1950.

Plaintiffs Merrill and Betty Mest (the "Mests") own and operate a dairy farm located

---

[1] Defendants' Motion for Summary Judgment includes additional arguments specific to Plaintiffs' individual causes of action. These arguments, as well as Plaintiffs' Motion for Summary Judgment, will be addressed in a separate opinion.

[2] The facts are taken from the memoranda and documentary evidence submitted to the Court and are recited in the light most favorable to Plaintiffs, the non-moving party. See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

[3] In their Second Amended Complaint, the Hallowells added as plaintiffs their children, the Hallowell Farms Partnership, The Wayne Z. Hallowell Family Revocable Trust, and themselves in their capacities as Trustees of the Trust. Because these additional Plaintiffs' claims are identical to the Hallowells, this opinion does not refer to these Plaintiffs specifically.

at 3059 Keyser Road, Schwenksville, Montgomery County, Pennsylvania (the "Mest Farm"). The Mests have farmed their land for at least forty years. Both the Mests and the Hallowells also lease fields near their farms to grow forage crops for use in their dairy farm operations.

Defendants Cabot Corporation and Cabot Performance Materials (collectively referred to as "Cabot") have operated a specialty metals manufacturing facility in Boyertown, Pennsylvania (the "Boyertown Facility") since 1978. The Boyertown Facility was previously owned and operated by Kawecki Berylco Industries, Inc. ("KBI"). According to Plaintiffs: 1) the Congo Road Farm is located approximately one mile east of the Boyertown Facility; 2) the Washington Road Farm is located approximately one mile northwest of the Boyertown Facility; and 3) the Mest Farm is located approximately four miles southeast of the Boyertown Facility.[4]

As a byproduct of its operations, the Boyertown Facility emits fluoride, which, while not harmful to humans, can cause a disease called fluorosis in cows that eat forage containing significant quantities of fluoride. Plaintiffs allege that fluoride emitted from the Boyertown Facility has been migrating by air to their farms and contaminating their vegetation, causing Plaintiffs' cows to suffer from fluorosis and exhibit resulting symptoms, including stained or "mottled" teeth, decreased milk production, and various reproductive problems.

A. Fluoride Studies of the Boyertown Facility and Surrounding Land

Since approximately 1976, numerous studies and investigations have been conducted on the Boyertown Facility's emissions and the emissions' effect on the surrounding land. Plaintiffs initiated some of these studies, while governmental agencies or third parties initiated others. Each of these investigations is discussed below.

[4] Pls.' Statement in Opp. at 4.

1. The Davis Reports

In 1976, the Pennsylvania Department of Environmental Resources, subsequently renamed the Pennsylvania Department of Environmental Protection (both entities are referred to herein as "DEP"), studied crop damage to a farm bordering the Boyertown Facility. DEP testing revealed damage consistent with fluoride contamination and concentrations of fluoride in the corn leaves and tree leaves.[5]

On June 15, 1978, DEP entered into a contract with Pennsylvania State University Professor Donald D. Davis to conduct a study to determine the distribution and extent of fluoride in vegetation growing near the Boyertown Facility. Dr. Davis continued this study through 1981 and published his results in separate annual reports dated 1979, 1980, 1981 and 1982 (the "Davis Reports"). Dr. Davis testified that he visited six farmers who agreed to allow him to sample vegetation from their farms.[6] The Congo Road Farm was one of the six farms that participated in the study, and laboratory results of vegetative samples from the Congo Road Farm were published in the 1980 and 1981 Davis Reports.[7]

The Davis Reports are available to the public upon request to DEP.[8] Although Mr.

---

[5] Letter from Robert Schlosser to Franklin Schlegel of Nov. 3, 1976.

[6] Davis Dep. at 27-28.

[7] Pls.' Statement in Opp. at 20.

[8] Despite the uncontradicted evidence that, while investigating the problems at Plaintiffs' farms, environmental investigator Bill Smedley discovered the Davis Reports on his own through a file review of DEP, Plaintiffs dispute that the Davis Reports are public documents. Plaintiffs argue that the Davis Reports were not published to the public because "[DEP's] policy with respect to the Davis Reports was that it would not 'publish' or otherwise release any of the reports unless someone specifically requested the reports from [DEP]." Pls.' Statement in Opp. at 15 (emphasis in original). This argument is comparable to an argument that a novel is not published or released until someone purchases it at a book store. Plaintiffs also emphasize their lack of knowledge of the Davis Reports' existence until 1999. However, just as an individual's awareness of the existence of that novel is irrelevant to whether it was published to the public, so is Plaintiffs' awareness of the Davis Reports irrelevant to whether they

Hallowell contends he was unaware the reports existed until 1999, he did testify to remembering strangers testing foliage at the Hallowell Farms and being told that it was a government study.[9] Plaintiffs rely on these reports in their Motion for Summary Judgment as evidence of Cabot's liability.

2. The Mests' Investigation of Their Cows' Problems

The Mests first experienced problems with their cows in 1980.[10] In 1982, Mr. Mest discussed his cows' health and milk production problems with Carl A. Brown, Ph.D., the feed sales manager for F.M. Brown & Sons, which had supplied the Mest farm with feed for a number of years. With the assistance of Dr. Richard Adams, a nutritionist, and Dr. Larry Hutchinson, a veterinarian, both of whom were professors at Pennsylvania State University, Dr. Brown undertook an investigation of the cause of these health and milk production problems (hereinafter referred to as the "Brown Investigation").

As a part of the Brown Investigation, the doctors tested feed samples from the Mest Farm for heavy metals, including fluoride. The results of this testing were included in a letter to Mr. Mest dated September 28, 1982.[11] This letter listed the concentrations of fluoride in various samples, but noted that the levels were "low and in the safe range."[12]

A fluoride analysis was also performed on the bone ash from the leg bone of a calf

---

were published to the public.

[9] Pls.' Statement in Opp. at 16 ("Although the Davis Reports may have been available upon request, one would have to know the Davis Reports existed before one could request them."); Wayne Hallowell Dep. of Mar. 13, 2002 ("Wayne Hallowell Dep. I") at 68-69.

[10] Merrill Mest Dep. of Mar. 5, 2002 ("Merrill Mest Dep. I") at 21.

[11] Letter from Barrie Moser to Merrill Mest of Sept. 28, 1982.

[12] Id.

from the Mest Farm. These test results were included in a letter to Mr. Mest dated January 5, 1983.[13] This second letter noted that "the fluorine level is at least marginally high . . . ." and that "fluorine should be further studied in any new outbreak of problems."[14] Mr. Mest denies receiving either of these letters,[15] but his wife testified that in 1985 he told her that there had been fluoride contamination on their property.[16] Nevertheless, none of these tests, nor any of the other tests conducted during the Brown Investigation, resulted in a diagnosis of fluorosis in the Mests' cows or of unsafe levels of fluoride in their crops.

Mr. Mest claims to have taken other steps to investigate his cows' problems. He testified that in the late 1980's or early 1990's he called DEP to have his feed and water tested; DEP found nothing abnormal.[17] Mr. Mest also testified that he took two calves to Summerdale, a state laboratory in Harrisburg, Pennsylvania, for evaluation, but he could not remember whether he took these calves in connection with the Brown Investigation, nor could he remember when this occurred.[18] Furthermore, Mr. Mest did not receive a report from the Summerdale lab and "never found anything out" about the results of the testing.[19] Other than the Brown Investigation and these two isolated tests, there is no evidence of tests being conducted at the Mest Farms or on the Mest

---

[13] Letter from Richard Adams to Merrill Mest of Jan. 5, 1983.

[14] Id. Dr. Brown testified that a fluoride expert was not consulted because "[t]he money was not available to pay for it." Brown Dep. at 134. However, because Plaintiffs dispute the meaning of this statement, the Court does not rely on it for the purposes of this Memorandum Opinion.

[15] Merrill Mest Dec. of Jan. 7, 2004 at ¶ 11.

[16] Betty Mest Dep. at 132.

[17] Merrill Mest Dep. I at 37-40.

[18] Id. at 70-74.

[19] Id. at 74.

cows until the 1998-2000 EPA Assessment discussed below.

3. The Hallowells' Investigation of Their Cows' Problems

The Hallowells first began having problems on their farms in 1973.[20] Mr. Hallowell testified that his father, who noticed a smell emanating from the direction of the Boyertown Facility, called several times to complain to the Boyertown Facility.[21] Although KBI/Cabot allegedly denied responsibility during these calls, the smells continued to bother the Hallowells throughout the 1980's.[22] Mr. Hallowell's father also called Cabot to complain that their drinking water tasted funny.[23] Further, Mr. Hallowell's brother testified that in the early 1980's Mr. Hallowell believed that the Boyertown Facility "could be causing some problems."[24]

In 1996, Mr. Hallowell initiated an investigation into the cause of his cows' problems with the help of Dr. William Francisco, a veterinarian who provided veterinary services at the Hallowell Farms for several years until approximately 1996. According to Dr. Francisco, Mr. Hallowell was worried about fluoride poisoning in his cows, so Dr. Francisco submitted several blood samples to Michigan State University for fluoride testing.[25] Dr. Francisco also worked with Timothy Fritz, Mr. Hallowell's local agricultural agent, to retain the services of the New Bolton

---

[20] Wayne Hallowell Dep. I at 34-35.

[21] Pls.' Resp. in Opp. at 39.

[22] Pls.' Statement in Opp. at 44.

[23] Id.

[24] James Hallowell Dep. at 85.

[25] Francisco Dep. at 40-41, 44.

Center at the University of Pennsylvania to conduct tests.[26] After completing these tests, Dr. Robert Poppenga from New Bolton ruled out fluorosis as the cause of the Hallowell cows' injuries.[27]

In February 1997, Mr. Hallowell called the Boyertown Facility to inquire about: 1) his men passing out in a field he was renting next to Cabot; 2) the water at his farm; and 3) radiation coming from the Boyertown Facility.[28] According to Mr. Hallowell, Cabot denied all responsibility for Mr. Hallowell's employees passing out and informed him that chemicals from the Boyertown Facility were not the cause of his cows' problems.[29] Mr. Hallowell states that he relied on Cabot's representations in this phone call and thus did not suspect the Boyertown Facility to be the cause of his cows' problems.

In the fall of 1998, Mr. Hallowell contacted the United States Environmental Protection Agency ("EPA") and discussed the ongoing problems with his herd.[30] "The EPA subsequently initiated a removal assessment in December 1998 to determine if a release of hazardous substances or pollutants posed a threat to human health or the environment in the vicinity of" the Congo Road Farm.[31] EPA also included the Mest Farm in its sampling, but found that it "does not exhibit levels of elements or compounds indicative of a release of hazardous substances outside of

---

[26] Pls.' Resp. in Opp. at 40. Dr. Robert Munson from New Bolton testified that Mr. Hallowell had expressed to him a concern about fluoride from the Boyertown Facility being a factor with his cow problems. Munson Dep. at 27-28. Mr. Hallowell denies having made these statements.

[27] Poppenga Dep. at 57-58.

[28] Wayne Hallowell Dep. at 72.

[29] Wayne Hallowell Dec. of Jan. 7, 2004 at ¶ 8.

[30] Wayne Hallowell Dep. at 118; Report: EPA Removal Assessment, Boyertown Area Farms, November 2000 at 3 [hereinafter "EPA Assessment"].

[31] EPA Assessment at 3.

the farm. As such, the [Mest Farm] is a good reference, background, or comparative location when evaluating potential releases of hazardous substances. . . ."[32] With respect to tests on animals, the EPA Assessment, issued almost two years later, concluded:

> [S]pecific ailments observed in dairy cattle are not related to a release of hazardous substances from an identified emission source. Specifically, the evaluation of the dairy cattle at the [Congo Road and Mest Farms] and the analytical results of vegetation and feed samples do not indicate that fluoride, or any other uncontrolled hazardous substance, cause the reported dairy herd health problems. Instead, examination of the cows, the dairy operations, and the results of necropsy of afflicted animals conducted at Cornell University indicates that their problems are attributable to farm-specific factors.[33]

4. Dr. Krook's Involvement

In March 1999, Bill Smedley, an environmental investigator for GreenWatch, Inc., met with Mr. Mest and Mr. Hallowell after learning about "the problems in Gilbertsville, PA with dairy cows."[34] At this initial meeting, Mr. Mest and Mr. Hallowell discussed the history and details of the problems they had experienced. On April 19, 1999, Mr. Smedley met with Mr. Mest and Mr. Hallowell a second time. At this meeting, Plaintiffs agreed to pay for GreenWatch to conduct a limited investigation involving "telephone research, interviews and a file review of [DEP's] public records on Cabot Corporation."[35] During this investigation, Mr. Smedley heard about Dr. Lennart Krook from a newspaper reporter. In July 1999, Mr. Smedley retained Dr. Krook to do a site visit of the Mest and Hallowell Farms.[36] After completing his investigation of the farms, Dr. Krook

---

[32] Id. at 1.

[33] Id. at iii.

[34] GreenWatch, Inc., Initial Report: Gilbertsville Case.

[35] Id.

[36] Smedley Dep. at 105.

concluded that Plaintiffs' cows were suffering from fluorosis.

II. PROCEDURAL HISTORY

On December 31, 1999, the parties entered into a Tolling/Standstill Agreement pursuant to which the statute of limitations was tolled for nine months, from December 31, 1999 until September 30, 2000. Plaintiffs commenced this action on August 10, 2001 in the Montgomery County Court of Common Pleas. On September 28, 2001, Defendants removed the case to this Court based on diversity jurisdiction.

On April 12, 2002, before the completion of discovery,[37] Defendants filed a Motion for Summary Judgment limited to the statute of limitations issue. The Court denied Defendants' Motion on January 14, 2003, noting that there were genuine issues of material fact regarding when the statute of limitations began to run. On May 9, 2003, the Court granted Plaintiffs' Motion to File an Amended Complaint which, inter alia, asserted additional damages claims and added causes of action for fraud and fraudulent misrepresentation. On December 2, 2003, the Court granted Plaintiffs' Motion to File a Second Amended Complaint which added several Plaintiffs but no additional causes of action. On the completion of all factual and expert discovery, Defendants again raise the statute of limitations issue in the instant Motion for Summary Judgment. Thus, the Court revisits this issue here.

[37] Discovery in this matter was ongoing until September 30, 2003.

III. DISCUSSION[38]

The parties agree that the applicable statute of limitations for Plaintiffs' causes of action is two years, and that because of the Tolling/Standstill Agreement, Plaintiffs' claims are barred if the statute began to accrue before November 10, 1998. Thus, the only issue for the Court is when the statute of limitations began to accrue.

Normally, "the statute of limitations begins to run as soon as the right to institute and maintain a suit arises; lack of knowledge, mistake or misunderstanding do not toll the running of the statute of limitations."[39] Plaintiffs argue, however, that the statute of limitations was tolled both by the discovery rule and because of Defendants' fraudulent representations to Plaintiffs. Both exceptions are discussed below.

A. The Discovery Rule

The Third Circuit has explained the discovery rule as follows:

> The discovery rule tolls the statute of limitations when a plaintiff, despite the exercise of due diligence, is unable to know of the existence of the injury and its cause.
>
> Under the most recent restatement of the discovery rule, the statute of limitations begins to run as soon as "the plaintiff knows, or reasonably should

---

[38] The well-known standard of review for a summary judgment motion applies here:

> Under Federal Rule of Civil Procedure 56(c), summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." To avoid summary judgment, disputes must be both 1) material, meaning concerning facts that are relevant and necessary and that might affect the outcome of the action under governing law, and 2) genuine, meaning the evidence must be such that a reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). When deciding a motion for summary judgment, all facts must be viewed and all reasonable inferences must be drawn in favor of the nonmoving party. Matsushita Elec. Indus. Co., Ltd., 475 U.S. at 587.

[39] Pocono Int'l Raceway, Inc. v. Pocono Produce, Inc., 468 A.2d 468, 471 (Pa. 1983).

> know, (1) that he has been injured, and (2) that his injury has been caused by another party's conduct."
> . . . .
>
> The "polestar" of the discovery rule is not the plaintiff's actual knowledge, but rather "whether the knowledge was known, or through the exercise of diligence, knowable to [the] plaintiff." Every plaintiff has a duty to exercise "reasonable diligence" in ascertaining the existence of the injury and its cause. Although "there are very few facts which [reasonable] diligence cannot discover, . . . there must be some reason to awaken inquiry and direct diligence in the channel in which it would be successful." The question whether a plaintiff has exercised reasonable diligence is usually a jury question. The statute of limitations begins to run as soon as the plaintiff has discovered or, exercising reasonable diligence, should have discovered the injury and its cause.[40]

This rule comes up most often in medical malpractice and latent, or "creeping," disease cases where the plaintiffs frequently do not discover their injuries until many years after a tort occurred.

Plaintiffs argue that because they did not know that fluoride caused the problems with their herds until Dr. Krook told them so in 1999, the discovery rule applies to toll the statute of limitations. Plaintiffs' actual knowledge, however, is only partially relevant. The more important question for the application of the discovery rule is whether Plaintiffs exercised reasonable diligence in attempting to determine the cause of their cows' problems. Plaintiffs bear a heavy burden to establish that they exercised reasonable diligence:

> Our cases firmly establish that the "reasonable diligence" standard has some teeth. A person claiming the discovery rule exception has the burden of establishing that he pursued the cause of his injury with "those qualities of attention, knowledge, intelligence and judgment which society requires of its members for the protection of their own interests and the interests of

[40] Bohus v. Beloff, 950 F.2d 919, 924 (3d Cir. 1991) (internal citations omitted); see also Cochran v. GAF Corp., 666 A.2d 245, 248 (Pa. 1995) ("Where the issue involves a factual determination regarding what constitutes a reasonable time for the plaintiff to discover his injury and its cause, the issue is usually for the jury. This is the general rule we set forth today. However, we also recognize the well established principle that where the facts are so clear that reasonable minds cannot differ, the commencement period may be determined as a matter of law.") (internal citations omitted).

others."[41]

Even taking the evidence in the light most favorable to Plaintiffs, no reasonable jury could conclude that the Mests or Hallowells have satisfied this heavy burden.

1. The Mests

Mr. Mest has admitted that he has been aware of the alleged injuries to his herd since 1980, yet the evidence demonstrates, at most, three investigations of his cows' problems until the EPA Assessment that began in 1998: 1) the 1982-83 Brown Investigation; 2) a test of the Mests' water and feed in the late 1980's or early 1990's; and 3) testing on two calves which may or may not have been related to the Brown Investigation. No reasonable juror could conclude that the Mests' efforts at determining the cause of their alleged injuries satisfy the reasonable diligence standard of the discovery rule.

Plaintiffs argue that Mr. Mest reasonably relied on the inability of Drs. Brown, Hutchinson and Adams to determine the cause of the Mest cows' problems. This argument lacks merit. Even accepting, as the Court must, Mr. Mest's claim that he did not receive the January 5, 1983 letter explicitly advising him that "fluorine should be further studied in any new outbreak of problems,[42] Mr. Mest has failed to meet his burden. He did not learn the results of the Brown

[41] Cochran, 666 A.2d at 250 (quoting Burnside v. Abbott Labs., 505 A.2d 973, 988 (Pa. Super. Ct. 1985)); see also Vernau v. Vic's Market, Inc., 896 F.2d 43, 46 (3d. Cir 1990) ("Reasonable diligence has been defined as follows: 'There are very few facts which diligence cannot discover, but there must be some reason to awaken inquiry and direct diligence in the channel in which it would be successful. This is what is meant by reasonable diligence.'") (quoting Urland v. Merrell-Dow Pharms., Inc., 822 F.2d 1268, 1273 (3d Cir. 1987)); Crouse v. Cyclops Indus., 745 A.2d 606, 611 (Pa. 2000) ("This Court has long held that there are few facts which diligence cannot discover.").

[42] A nonmovant cannot create a genuine issue of material fact simply by submitting a declaration containing unsupported assertions that contradict the balance of the evidence. Here, the only evidence Plaintiffs offer that Mr. Mest did not receive the January 5, 1983 letter is a declaration Mr. Mest submitted with Plaintiffs' response to Defendants' Motion for Summary Judgment. Nevertheless, the Court accepts Mr. Mest's unsupported claim because it does not alter the Court's decision to grant Defendants' Motion.

Investigation until early 1983, more than two years after his cows first exhibited symptoms. Thus, the statute of limitations had run as to the injuries the Mests suffered in 1980 even before Mr. Mest received the results of this initial investigation. Moreover, the results of this investigation were inconclusive - - his cows' injuries were not misdiagnosed; rather, their problems remained a mystery. The discovery rule requires that Plaintiffs do more than conduct one unsuccessful investigation into the cause of their injuries.[43]

The expediency with which Mr. Smedley, the environmental investigator, was able to discover the alleged cause of Plaintiffs' cows' problems demonstrates that this information could have been discovered had Plaintiffs exercised reasonable diligence. Mr. Smedley first initiated a meeting with Mr. Mest and Mr. Hallowell in March 1999. By July 1999, he had obtained the Davis Reports and located Dr. Krook, who first diagnosed Plaintiffs' cows with fluorosis.

The Third Circuit's recent holding in Debiec v. Cabot Corp., 352 F.3d 117 (3d. Cir 2003), upon which Plaintiffs place great reliance, does not extend to the facts in this case.[44] In Debiec, the Third Circuit reversed the District Court's grant of summary judgment against three plaintiffs suffering from beryllium poisoning. Although each of the three plaintiffs was aware of her

---

[43] Cochran, 666 A.2d at 250 (Reasonable diligence "may require a party to obtain additional legal and medical advice. Also, a party may not rely on mistake or misunderstanding to toll the limitations period. The approach of the Dissent would dramatically expand the discovery rule and open the flood gates to allow anyone with a good faith lack of diligence to claim benefit of the rule. The standard proposed by the Dissent would severely erode the finality of our statute of limitations, and that would truly be a 'grievous error.'")

[44] Plaintiffs also rely on several other cases that similarly involve plaintiffs who relied on a physician's misdiagnosis of their injuries. See, e.g., Bohus, 950 F.2d 919 (finding that plaintiff was given no reason to doubt the prognosis given her by her personal physician and two additional physicians she consulted when her pain did not subside); Burnside, 505 A.2d 973 (finding existence of a jury question as to whether plaintiff had reason to know her injuries had been caused by the drug DES which her mother ingested during pregnancy when both plaintiff's physician and her mother's physician said DES was not the cause); DeMartino v. Albert Einstein Med. Cent., N. Div., 460 A.2d 295 (Pa. Super. Ct. 1983) ("While undergoing medical treatment and while acting in accordance with the confidence and trust inherent in a doctor-patient relationship it is difficult if not impossible to ascertain that the treatment has caused or may be causing an injury."). These cases are similarly inapplicable to the situation here.

injury more than two years prior to filing suit and suspected that beryllium was the cause, the plaintiffs' doctors told them that beryllium was not the cause of their injuries. Accordingly, the court held:

> To the extent that the defendants argue that a definitive diagnosis of [chronic scarring lung disease] was not necessary to start the statute running, we agree; unrebutted suspicion that a claimant has a particular disease, which is an injury caused by another, is sufficient to start the clock. However, we also conclude that the fact that a definitive diagnosis is not necessary to start the statute running when a plaintiff suspects she has been injured and believes she knows the cause of her injury does not mean that when a doctor affirmatively tells a claimant that she does not have a certain disease, and therefore that the defendant was not the cause of her injury, the fact that the claimant harbors her own suspicions to the contrary necessarily starts the clock as well.
>
> This conclusion is buttressed by the well-reasoned opinion in Frisbie v. Wiseman, 56 Pa. D. & C.4th 403 (Pa. Common Pleas 2001). This medical malpractice case was brought against a physician who mis-diagnosed cervical cancer as genital herpes. The plaintiff filed her complaint more than two years after she initially suspected that her diagnosis might be incorrect. The Court held that despite these suspicions, and the possibility that she could have sought a second opinion, the fact that the plaintiff's doctor and physician's assistant repeatedly assured her that she had herpes, not cancer, meant that the statute did not start to run until a second physician's assistant recommended a biopsy and the cancer was discovered.
>
> In addition, in Bohus this Court held that a plaintiff's reliance on a doctor's assurances is reasonable as long as the plaintiff retains confidence in the doctor's professional abilities. In other words, a doctor's assurances that a plaintiff does not have a particular injury may toll the statute of limitations until that "point in time when a patient's own 'common sense' should lead her to conclude that it is no longer reasonable to rely on the assurances of her doctor." 950 F.2d at 930.
>
> In sum, we conclude that this set of cases about the relationship between a claimant and her physicians stands for two propositions: (1) a definitive diagnosis of an injury is not necessary to start the statute running; and (2) a definitive negative diagnosis may be sufficient in some cases to overcome the

fact that the claimant harbored suspicions that she had a particular injury.[45]

Several factual differences distinguish Debiec from the case before the Court. First, a person's reliance on his or her personal physician's diagnosis is not the same as a farmer's reliance on the conclusions of a veterinarian or scientist. The Debiec court placed great weight on the testimony of one deceased plaintiff's husband that the plaintiff "had confidence" in her physician and that "[s]he had built up trust, a relationship."[46] There is no evidence of such a relationship between Mr. Mest and the doctors who studied his cows in 1982-83.

Second, in Debiec, the deceased plaintiff's doctor "told her that she did not have berylliosis (she believed him) and . . . consistently diagnosed her as suffering from sarcoidosis."[47] Conversely, the Brown Investigation yielded no diagnosis of the cause of the Mest cows' injuries. Even if the Brown Investigation did not diagnose fluorosis, this does not make it reasonable for Mr. Mest to rely on this non-diagnosis as his reason for failing to take further measures to determine the true cause of his injuries. In essence, Mr. Mest claims to rely on the Brown Investigation's conclusion that the cause of his cows' problems was still a mystery. This reliance is not reasonable; reasonable diligence requires that a plaintiff do more than initiate one unsuccessful inquiry into the cause of his or her injuries. Further, Mr. Mest's purported reliance is even less reasonable in light of his wife's testimony that he told her in 1985 that there was fluoride contamination on their property.

---

[45] Debiec, 352 F.3d at 132 (emphasis in original).

[46] Id. at 136. The court quoted the following testimony from the plaintiff's husband: "Jane had a confidence in Dr. Shuman. She had built up trust, a relationship. When she would have a meeting, she would come home and we would–I would say to her, how did it go. And she would always tell me that Dr. Shuman would give her a big hug when they left. And she wasn't about to go to see anyone else." Id.

[47] Id.

Third, Debiec dealt with four plaintiffs who had been misdiagnosed and relied on that diagnosis as to their own physical injuries. Here, Mr. Mest asserts that he was having problems with his entire herd of cows over a period of 25 years. Undoubtedly, Mr. Mest's current herd is composed of many (if not entirely) different cows now than in 1980.[48] Nevertheless, Mr. Mest alleges that these new herds suffer from the same problems as the cows in 1980. However, Mr. Mest did not initiate any investigation into the recent cows' injuries, claiming reliance on the Brown Investigation's inability to diagnose the injuries suffered by the cows in his herd in 1982. No reasonable juror could find Mr. Mest has reasonably relied on the non-diagnosis of his cows in 1980 for the injuries suffered by different herds living in 1990.

For these reasons, the Court finds Mr. Mest's "failure to ascertain the cause of his injury was the result of 'somnolence,' rather than 'blameless ignorance.'"[49] Mr. Mest took virtually no action from 1983 until 1999 to determine the cause of a persistent and recurring injury that he claims was costing him millions of dollars in actual damages. Mr. Mest's sole explanation for this lack of action is that he relied on the results of tests that could not determine the cause of his cows' injuries. No reasonable juror could differ as to whether Mr. Mest exercised reasonable diligence. Accordingly, the statute of limitations on the Mests' causes of action was not tolled by the discovery rule.

---

[48] Although there is no evidence on the record regarding the lifespan of a dairy cow, Mr. Mest testified: 1) that he had between thirty and forty cows at any one time at his farm; and 2) that he sold or disposed of approximately nine cows per year since 1980. Merrill Mest Dep. I at 119.

[49] Cochran, 666 A.2d at 250.

2. The Hallowells

Mr. Hallowell was aware that his cows were injured as early as 1972.[50] In 1978, with Mr. Hallowell's knowledge, Dr. Davis took a sample of vegetation from the Congo Road Farm for use in his reports. Dr. Davis published his reports annually from 1979 until 1982, but despite the reports being public documents, Mr. Hallowell never obtained copies. Indeed, despite the Hallowells' claims that their farms suffered millions of dollars of damages due to the injuries to their cows, before 1996 they failed to conduct any investigation into the cause of these problems other than Mr. Hallowell's father's few phone calls to the Boyertown Facility about the smell. The Court fails to see how the discovery rule could possibly toll the Hallowells' causes of action between 1972 and 1996 when they exercised no diligence during that period to determine the cause of their cows' problems.

In 1996, Mr. Hallowell finally instituted an investigation into his cows' problems with the New Bolton Center. Mr. Hallowell claims to have relied on Dr. Poppenga's conclusion that fluorosis was not the cause of his cows' injuries. He did not initiate any further scientific studies on his cows until the fall of 1998 when he contacted EPA to complain of these problems. In March 1999, Mr. Smedley approached Mr. Hallowell about conducting an investigation into the problems on his farms. In the course of this investigation, Mr. Smedley contacted Dr. Krook who became the first person to diagnose Mr. Hallowell's cows with fluorosis.

Plaintiffs' reliance on Debiec as it applies to the Hallowells' claims is similarly misplaced. First, Mr. Hallowell had no prior relationship with the New Bolton doctors who ruled out fluorosis as the cause of his cows' problems, so his reliance on their conclusion does not

[50] Wayne Hallowell Dep. I at 43-44.

compare to the reliance of a patient on the diagnosis of her personal and trusted physician. Second, although the New Bolton doctors did speculate that the Hallowell cows' injuries were caused by the mats in their stalls,[51] his reliance on that diagnosis was no longer reasonable when the problems did not abate after he replaced the mats. Third, like the Mests, the Hallowells allege that their herds of cows have been suffering injuries over the course of the last 25 years. That doctors ruled out fluorosis as the cause of the injuries suffered by the cows the Hallowells possessed in 1996 does not make it reasonable for Mr. Hallowell to rely on that non-diagnosis for the injuries suffered by the cows he owned in subsequent years. Therefore, the Court finds that no reasonable juror would differ as to whether the Hallowells exercised reasonable diligence. Accordingly, the statute of limitations on the Hallowells' causes of action was not tolled by the discovery rule.

B. Fraudulent Concealment

Plaintiffs also argue that the statute of limitations is tolled because: 1) they justifiably relied on statements from Cabot that the Boyertown Facility was not the cause of the problems at their farms; and 2) because Cabot concealed from them that fluoride could cause problems in cattle and did not tell them about the Davis Reports. The latter claim fails because Cabot did not owe a duty to Plaintiffs to tell them about the Davis Reports or to otherwise speak to them. Plaintiffs' misrepresentation claim is discussed below.

Plaintiffs' misrepresentation claim is based upon the phone calls between the Boyertown Facility and Mr. Hallowell's father in the 1970's and the phone call Mr. Hallowell made in 1997 when his men passed out in a field. Plaintiffs claim their reliance on Cabot's statements during these phone calls was the reason they did not investigate further the causes of their cows'

[51] Pls.' Supp. Mem. at 6-7.

injuries. As an initial matter, because Plaintiffs do not put forth any evidence that Mr. Mest ever spoke with anyone from Cabot or the Boyertown Facility or that Mr. Hallowell ever conveyed Cabot's statements to the Mests, Plaintiffs' fraudulent concealment argument fails as to the Mests. For the reasons set forth below, this argument fails as to the Hallowells as well.

The doctrine of fraudulent concealment "tolls the statute of limitations where through fraud or concealment the defendant causes the plaintiff to relax his vigilance or deviate from the right of inquiry. . . . There must be an affirmative and independent act of concealment that would divert or mislead the plaintiff from discovering the injury."[52] The Court applies the same analysis here as under the discovery rule:

> "The Supreme Court [of Pennsylvania] views tolling the statute of limitations in terms of the 'knew or should have known' standard whether the statute is tolled because of the discovery rule or because of fraudulent concealment." Thus, the inquiry under the fraudulent concealment doctrine is the same as that under the discovery rule.[53]

Therefore, "fraudulent concealment will not toll the running of the statute of limitations period when a plaintiff has not exercised reasonable diligence. Stated another way, even if a defendant commits fraud or concealment, a plaintiff must show that his ignorance of his injury and its cause was not due to his own lack of reasonable diligence."[54]

Here, it was not reasonable for Plaintiffs to rely on the statements of a company they suspected of poisoning their cow herds. Further, even if Plaintiffs did rely on Cabot's statements

---

[52] Bohus, 950 F.2d at 925 (internal quotations and citations omitted).

[53] Id. at 926.

[54] Tyler v. O'Neill, No. Civ.A.97-3353, 1998 U.S. Dist. LEXIS 20007, at *8 (E.D. Pa. Dec. 15, 1998) (internal citations omitted).

at the time the statements were made, it was unreasonable for Plaintiffs to continue to rely on those statements when their cows continued to have problems. Indeed, Plaintiffs' alleged reliance on Cabot's statements was infinitely less reasonable than their reliance on the statements of the professionals who investigated their herds, and, as discussed above, even that reliance was not reasonable. Accordingly, no reasonable jury could find that Plaintiffs could be "lulled into a state of acquiescence" after hearing Cabot's statements.[55] Accordingly, the statute of limitations on Plaintiffs' causes of action was not tolled by the fraudulent concealment doctrine.

IV. CONCLUSION

For the foregoing reasons, taking the evidence in the light most favorable to Plaintiffs, no reasonable jury could find that the statute of limitations was tolled for Plaintiffs' causes of action. Accordingly, Plaintiffs causes of action based on Cabot's actions prior to November 10, 1998 are dismissed.

An appropriate Order follows.

[55] See DeMartino, 460 A.2d at 302.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MERRILL MEST, et al.,	:	
Plaintiffs	:	
	:	
v.	:	**CIVIL ACTION**
	:	**NO. 01-4943**
CABOT CORPORATION, et al.,	:	
Defendants	:	

ORDER

AND NOW, this 29th day of April, 2004, after a hearing, and upon consideration of Defendants Cabot Corporation and Cabot Performance Materials' Motion for Summary Judgment and accompanying documents and exhibits [Doc. 82], Plaintiffs Merrill Mest, Betty Mest, Suzanne Hallowell (individually and as Trustee), Wayne Hallowell (individually and as Trustee), Sean Hallowell, Amber Hallowell (a minor, by her next friend and parent, Wayne Hallowell), The Hallowell Farms Partnership, and The Wayne Z. Hallowell Family Revocable Trust's Statement in Opposition and Response thereto and accompanying exhibits [Docs. ##84-87, 89-90], Defendants' Reply Memorandum [Doc. #92], Defendants' Post-Argument Brief [Doc. #125], and Plaintiffs' Supplemental Memorandum in Opposition [Doc. #123], the Court finds that the statute of limitations on Plaintiffs' claims based on Defendants' activities prior to November 10, 1998 has expired. Accordingly, it is hereby **ORDERED** that Defendants' Motion for Summary Judgment is **GRANTED** and **JUDGMENT IS ENTERED** in favor of Defendants on Plaintiffs' claims based on Defendants' activities prior to November 10, 1998.

The Court reserves judgment on the remaining Motions for Summary Judgment.

It is so **ORDERED**.

BY THE COURT:

_____

CYNTHIA M. RUFE, J.